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ROBERT LINGGI

v.

THE GOVERNMENT OF MALAYSIA

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K21-07-2009]
15 MARCH 2011

C ***CIVIL PROCEDURE:*** *Locus standi - Breach of Federal Constitution - Whether plaintiff had locus standi to litigate perceived breach of Federal Constitution by legislature - Challenging amendments made to Federal Constitution on matters pertaining appointment, removal and suspension of judges - Whether plaintiff had locus standi*

D ***CONSTITUTIONAL LAW:*** *Judges - Appointment, removal and suspension - Whether removal of the power of appointment of judicial commissioners of the High Court of Sabah and Sarawak by the Yang di-Pertua Negeri is null and void - Constitution (Amendment) Act 1994*
E *- Amendments introduced without consent of Yang di-Pertua Negeri - Whether new art. 122AB of the Federal Constitution null and void - Whether setting up of Judicial Appointments Commission is unconstitutional - Federal Constitution, art. 161E(2)(b)*

F ***CONSTITUTIONAL LAW:*** *Legislation - Amendment - Whether only Parliament can make or amend laws - Whether the Prime Minister may amend any law by way of gazette - Whether s. 37 of the Judicial Appointments Commission Act 2009 null and void*

G The plaintiff, a Sabahan, made this application to safeguard what he perceived as breaches of the constitutional positions entrenched in respect of the High Court of Sabah and Sarawak ('HCSS') under art. 161E(2)(b) of the Federal Constitution ('the Constitution'). The issue concerned the appointment of judicial commissioners ('JCs') to the HCSS. Prior to the amendments to
H art. 122A(3) and (4) of the Constitution on 24 June 1994, the JCs of the HCSS may be appointed by the respective Yang di-Pertua Negeri acting on the advice of the Chief Judge of HCSS. After 24 June 1994, the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak ('YDPs') to appoint JCs was taken
I away by the Constitution (Amendment) Act 1994 ('1994

Amendments') which incorporated a new art. 122AB. The plaintiff sought the following declarations: (i) that the removal of judicial power from the HCSS by virtue of the amendment to art. 121 of the Constitution was null and void; (ii) that the removal of the power of appointment of JCs to the HCSS by the YDPs was null and void; and (iii) that the setting up of the Judicial Appointment Commission ('JAC') under the Judicial Appointment Commission Act 2009 ('the Act') was unconstitutional and hence null and void. The parties agreed to the following issues to be tried under O. 14A of the Rules of the High Court 1980: (a) whether the plaintiff had the *locus standi* to bring this suit; (b) whether the concurrence of the YDPs was required pursuant to art. 161E(2)(b) of the Constitution when art. 122A(3) and (4) of the Constitution was amended and art. 122AB of the same was inserted with effect from 24 June 1994; and (c) whether the enactment of the Act which came into force on 2 February 2009 was unconstitutional, null and void on the grounds that: (i) it departed from the constitutional procedure and mode of appointment of JCs and judges set out in art. 122AB and 122B of the Constitution and in effect it would be the substitute for the present consultative process between the Prime Minister and the individual judges under the said articles; (ii) it was in effect an amendment of art. 122AB and 122B of the Constitution and enacted in contravention of art. 159(3) of the Constitution; (iii) there was no concurrences of the YDPs pursuant to art. 161E(2)(b) of the Constitution; and (iv) s. 37 of the Act was enacted in contravention of art. 44 of the Constitution.

Held:

(1) All Malaysians have an entrenched right to litigate their grievance in court whenever there is a perceived breach of the Constitution by the legislature. The plaintiff, as a Sabahan, was genuinely concerned with the erosion of the rights of Sabah in so far as "the constitution and jurisdiction of the HCSS and the appointment, removal and suspension of judges of that court" and since it concerned an attempt to uphold the Constitution, the plaintiff had the *locus standi* to bring this action. (paras 6 & 11)

(2) Article 161E(2) prohibits amendments to the Constitution without the consent of the respective YDPs if the amendment is such as to affect the operation of the Constitution as regard

A the constitution and jurisdiction. The word "constitution" refers to "existence" or the "made up or structure" of the HCSS. The 1994 Amendment did not affect the existence of the HCSS. As for the "make up" of the HCSS, it must involve the judicial officers presiding or manning in the courts
B in Sabah and Sarawak. They so to speak are the "make up" or part of the structure of the court. A JC is a judicial officer of the court and constitutes part of the structure of the court. Hence when the 1994 Amendment was introduced without the consent of the respective YDPs, it contravened art. 161E
C (2)(b). The 1994 Amendment was invalid and therefore null and void in so far as it concerned the removal of the power to appoint JCs by the respective YDPs. (paras 17, 19 & 26)

(3) Article 122AB and 122B of the Constitution provides that
D "the Prime Minister shall consult" the relevant judges before he advises the Yang di Pertuan Agong for any appointment of judges. This duty to consult is a constitutional duty and it can only be taken away by an express amendment to the Constitution. There was no such constitutional amendment
E and hence the Act must be read subject to that constitutional duty to consult. Accordingly s. 28 of the Act should not be read as if there is no requirement for the Prime Minister of the day to consult the relevant judges before he tenders his advice in accordance with art. 122AB and 122B of the Constitution.
F To read otherwise would make s. 28 *ultra vires* the Constitution. (paras 40 & 44)

(4) Section 37 of the Act gave the power of the Prime Minister to amend any provisions of the Act by way of a gazette. Any
G amendment to the Act or for that matter any legislation is an exercise of legislative power. The doctrine of separation of powers embodied in the Constitution dictates that only Parliament can make or amend laws. Hence, s. 37 of the Act was null and void as it contravened the Constitution. (para 45)

H

(5) Article 122AB of the Constitution is null and void in so far as the appointment of JCs by the respective YDPs is concerned. (para 46)

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Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***

B Surinder Singh Kanda v. The Government of the Federation Malaya [1962] 1 LNS 14 FC ***(refd)***

Boyce v. Paddington BC [1903] Ch 109 ***(refd)***

Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii [2009] 4 CLJ 449 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 ***(refd)***

Rev. Christopher Mtikila v. The Attorney-General, Civil Case No. 5 of 1993 ***(refd)***

Rickards v. The Medical Benefits Fund of Australia Ltd (Unreported 18 April 1975 - referred to in Declaratory Orders 2nd Edition PW Young QC) ***(refd)***

State of Bihar and Others v. Bihar Distillery Ltd AIR [1997] SC 1511 ***(refd)***

The Society for the Protection of Unborn Children (Ireland) Ltd v. Diarmund Coogan & Ors (1988 No. 7714P) ***(refd)***

Legislation referred to:

Federal Constitution, arts. 4(1), 13, 44, 121(1), 122AB, 122B, 159(3), 161E(2)(b)

Immigration Act 1959/1963, s. 65(1)(c)

Judicial Appointment Commission Act 2009, ss. 5, 21, 22, 23, 26, 27, 28, 37

Rules of the High Court 1980, O. 14A

For the plaintiff - Datuk Lawrence Thien; M/s Chau & Thien

For the defendant - Suzana Atan SFC (Narkunavathy Sundareson with her); AG's Chambers

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiff comes to court to seek the following declarations:

A (a) That the removal of judicial power from the High Court of Sabah and Sarawak by virtue of the amendment to art. 121 of the Federal Constitution is null and void.

(b) That the removal of the power of appointment of judicial
B commissioners to the High Court of Sabah and Sarawak by the Yang di-Pertua Negeri of both Sabah and Sarawak by is null and void.

(c) That the setting up of the Judicial Appointment Commission (JAC) under the Judicial Appointment Commission Act 2009
C is unconstitutional and hence null and void.

Issues

[2] During the case management stage, on 12 October 2010,
D parties agreed to the facts set out in encl. 31 and the following issues to be tried under O. 14A of the Rules of the High Court:

1. Whether the plaintiff has the *locus standi* to bring this suit;

2. Whether the concurrence of the Yang di-Pertua Negeri of
E each of the States of Sabah and Sarawak is required pursuant to art. 161E(2)(b) of the Federal Constitution when art. 121(1) of the Federal Constitution was amended with effect from 10 June 1988;

F 3. Whether the concurrence of the Yang di-Pertua Negeri of each of the States of Sabah and Sarawak is required pursuant to art. 161E(2)(b) of the Federal Constitution when art. 122A(3) and (4) of the Federal Constitution was amended and art. 122AB of the same was inserted with effect from
G 24 June 1994; and

4. Whether the enactment of the Judicial Appointments Commission Act 2009 (Act 695) which came into force on 2 February 2009 is unconstitutional, null and void on the
H grounds that:

(e) it departs from the constitutional procedure and mode of appointment of judicial commissioners and judges set out in arts. 122AB and 122B of the Federal Constitution and in effect it would be the substitute for the present
I consultative process between the Prime Minister and the individual judges under the said articles;

(f) it is in effect an amendment of arts. 122AB and 122B of the Federal Constitution and enacted in contravention of art. 159(3) of the Federal Constitution;

(g) there was no concurrences of the YdPN of each of the States of Sabah and Sarawak pursuant to art. 161E(2)(b) of the Federal Constitution; and

(h) Section 37 of Act 695 was enacted in contravention of art. 44 of the Federal Constitution.

Deliberation Of Issues And Findings Of The Court:

Issue 1 – Whether The Plaintiff Has The Locus Standi To Bring This Suit?

[3] The plaintiff hails from the interior town of Keningau, Sabah and is a Malaysian citizen of Sabah origin or what is known colloquially in this country as a Sabahan. He comes to this court to safeguard what he perceives as breaches of the constitutional positions entrenched in respect of the High Court of Sabah and Sarawak under art. 161E(2)(b) which states as follows:

> (2) No amendment shall be made to the Constitution without the concurrence of the Yang di-Pertua Negeri of the State of Sabah and Sarawak or each of the States of Sabah and Sarawak concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters:
>
> ... (b) the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court;

[4] Counsel for the defendant refers the court to the case of *Boyce v. Paddington BC* [1903] Ch 109 at 114 where Buckley J laid down the test for *'locus standi'* of a litigant in a public litigation:

> A plaintiff can sue without joining the Attorney General in two cases: first where the interference with the public right is such as that some private right of his at the same time interfered with (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right of access from

A and to his premises to and from the highway); and, secondly, where no private right is interfered with but the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right.

B **[5]** The case of *Rickards v. The Medical Benefits Fund of Australia Ltd* (unreported 18 April 1975 – referred to in Declaratory Orders 2nd Edition PW Young QC) was also referred to and in that case Bowen CJ held that where a plaintiff seeks a declaration involving the validity of an act of Parliament, the court should be slow in granting such declaration unless the real interest of the parties C before it will be decided by doing so and the giving of the declaration will effectively deal with the matters in controversy between them. Applying the test, counsel submits that the plaintiff lacks *'locus standi'* to come to this court for reliefs as there is no controversy between the plaintiff and the defendant as his rights D have not been affected.

[6] With respect to counsel for the defendant, to adopt her contention would be taking a retro step in the law on *'locus standi'* in public law especially when there is a challenge to legislations E made in contravention to the Federal Constitution. The Federal Constitution is the supreme law of the country and was drafted by the founding fathers of the country after taking into consideration the interests of all relevant parties prior to the formation of Malaysia. It is a document which belongs to all F Malaysian irrespective of their race and standing in society and starting from that base, it must logically follow that all Malaysians have an entrenched right to litigate their grievance in court whenever there is a perceived breach of the Federal Constitution by the legislature. In the local jurisdiction, suffice for me to refer G to two judiciary pronouncements in the person of Suffian LP and Abdoolcader J. The former Lord President in *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3 states as follows:

> The doctrine of the supremacy of Parliament does not apply in H Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> Under our Constitution written law may be invalid on one of these grounds:

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(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The Court has power to declare any Federal or State law invalid on any of the above three grounds.

The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual.

[7] The Lord President's pronouncement that the Federal Constitution as the Supreme Law of the country is premised on art. 4(1) of the Federal Constitution which states as follows:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[8] In *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 Abdoolcader J at p. 100 states as follows:

In *Finlay v. Minister of Finance of Canada* the Federal Court of Appeal of Canada allowed a citizen who was neither directly affected nor a taxpayer to challenge the validity of federal and provincial transfer of payments under the Canada Assistance Plan. The decision has been upheld by the Supreme Court of Canada sub nominee *Finlay v. Canada*. The Supreme Court decided that the interest of the applicant was too remote or speculative to grant standing under the general requirement that the plaintiff must have a sufficient private or personal interest in the subject matter. The Court went on to hold, however, that in appropriate public law cases, as a matter of judicial discretion, standing might be given to a private individual notwithstanding the fact that a constitutional or Charter of Rights and Freedoms issue was not involved. The Court thus extended that principle laid down in *Thorson v. Attorney-*

A *General for Canada*, *Nova Scotia Board of Censors v. McNeil* (both of which I dealt with in Lim Cho Hock) and Minister of Justice for *Canada v. Borowski* – all three of which involved the requirements for standing in a constitutional case where a party has no direct interest – to the field of administrative law and, in the result, granted standing to Finlay to bring action for a declaration to challenge the legality of the Federal cost-sharing arrangements.

[9] Counsel for the plaintiff had also referred to a case of the Tanzanian High Court which in my view is the correct approach in determining the plaintiff's locus standing in constitutional challenge cases. That case is *Rev. Christopher Mtikila v. The Attorney-General*, Civil Case No. 5 of 1993, High Court of Tanzania, where it held that:

> The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this Court will not deny standing to a genuine and *bona fide* litigant even where he has no personal interest in the matter ... Given all these and other circumstances, if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

[10] Another case that is worth mentioning is a decision by the Supreme Court of Ireland in *The Society for the Protection of Unborn Children (Ireland) Ltd v. Diarmund Coogan & Ors* (1988 No. 7714P). The Supreme Court shared the same sentiment as the Tanzanian High Court, where the court in its judgment held that:

> Every member of the public has an interest in seeing that the fundamental law of the State is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the Government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the Attorney General as the very officer of state instructed to defend the Government's position.

[11] The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as 'the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the *'locus standi'* to bring this action. I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the Supreme Law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our constitution.

Issue 2

Whether The Concurrence Of The Yang Di-pertua Negeri Of Each Of The States Of Sabah And Sarawak Is Required Pursuant To art. 161E(2)(b) Of The Federal Constitution When art. 121(1) Of The Federal Constitution Was Amended With Effect From 10 June 1988?

[12] This issue is put on abeyance pending production by counsel for the defendant of the original consent of the Yang Di-pertua Negeri Sabah, hence not necessary for me to deal with it now.

Issue 3 – Whether The Concurrence Of The Yang Di-pertua Negeri Of Each Of The States Of Sabah And Sarawak Is Required Pursuant To art. 161E(2)(b) Of The Federal Constitution When art. 122A(3) And (4) Of The Federal Constitution Was Amended And art. 122AB Of The Same Was Inserted With Effect From 24 June 1994?

[13] For this issue, it is not disputed by counsel for the defendant that no consent has been obtained from the respective Yang di-Pertua Negeri of Sabah and Sarawak. However it is her contention that no such consent is required on grounds which I shall allude to later.

[14] This issue concerns the appointment of judicial commissioners to the High Court of Sabah and Sarawak. Prior to the amendments to art. 122A (3) and (4) of the Federal Constitution on 24 June 1994, the appointment of judicial commissioners to the High Court of Sabah and Sarawak may be appointed by the respective Yang di-Pertua Negeri acting on the advice of the Chief Justice (now known as Chief Judge) of High Court of Sabah and Sarawak. The then art. 122A(3) and (4) read as follows:

A (3) For the dispatch of business of the High Court in Borneo in an area in which a judge of the Court is not for the time being available to attend to business of the Court, the Yang di-Pertuan Agong acting on the advice of the Lord President of the Federal Court, or for an area in either State the Yang di-Pertua Negeri of the State acting on the advice of the Chief Justice 3 of the Court, may by order appoint to be judicial commissioner in that area for such period or for such purposes as may be specified in the order an advocate or person professionally qualified to be admitted an advocates of the Court.

C (4) Subject to any limitations or conditions imposed by the order appointing him, a judicial commissioner shall have the power, in the area for which he is appointed, to perform such functions of a judge of the High Court in Borneo as appear to him to require to be performed without delay; and anything done by a judicial commissioner when acting in accordance with his appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

E **[15]** What happened after 24 June 1994 is that the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners has been taken away by the Constitution (Amendment) Act 1994 (1994 Amendments) which incorporated a new art. 122AB which reads as follows:

F (1) For the dispatch of business of the High Court of Malaya and the High Court of Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him required to be performed; and anything done by him when acting in accordance with his appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

I (2) The provisions of Clauses (2) and (5) of Article 124 shall apply to a judicial commissioner as they apply to a judge of a High Court.

[16] In view of the fact that the 1994 Amendments were made without the concurrence of the respective Yang Dipertua Negeri, counsel for the plaintiff submits that there has been non compliance with art. 161E (2) and hence they are unconstitutional and invalid.

[17] Counsel for the defendant however submits that no such consents are required as the 1994 amendments did not affect the operation of the Federal Constitution as regards the constitution and jurisdiction of the High Court of Sabah and Sarawak, hence there is no contravention of art. 161E(2). To recap, art. 161E(2) prohibits amendments to the Federal Constitution without the consent of the respective Yang di-Pertua Negeri 'if the amendment is such as to affect the operation of the (Federal) Constitution as regard the constitution and jurisdiction of High Court of Sabah and Sarawak'. The court is now tasked with the interpretation of two words in art. 161E(2) and they are 'operation' and 'constitution'.

[18] The '1994 amendment' in my mind had no doubt 'affected the operation' of the Federal Constitution as it had removed the power of appointment of judicial commissioners to the High Court by the Yang di Pertua Negeri. As for whether this 'operation' is in regard to the 'constitution' of the High Court of Sabah and Sarawak, the word 'constitution' as defined by Dictionary.com is as follows:

- noun

1. the way in which a thing is composed or made up; makeup; composition: the chemical constitution of the cleanser.
2. the physical character of the body as to strength, health, etc,: He has a strong constitution.
3. Medicine/Medical, Psychology. The aggregate of a person's physical and psychological characteristics.
4. the act or process of constituting; establishment.
5. the state of being constituted; formation.
6. any established arrangement or custom.

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7. (initial capital letter) Constitution of the United States.

8. the system of fundamental principles according to which a nation, state, corporation, or the like, is governed.

9. the document embodying these principles.

B

10. Archaic character or condition of mind; disposition; temperament,

[19] From that definition, it can be said in so far as what is relevant to the issue at hand, the word 'constitution' refers to C 'existence' or the 'made up or structure' of the High Court of Sabah and Sarawak. I have no issue to the contention that the 1994 Amendment did not affect the existence of the High Court of Sabah and Sarawak. As for the 'make up' of the High Court of Sabah and Sarawak, it must involve the judicial officers D presiding or manning in the courts in Sabah and Sarawak. They so to speak are the 'make up' or part of the structure of the court. A judicial commissioner is a judicial officer of the court and in my view as plain as daylight, constitute part of the structure of the court. Hence when the 1994 Amendment was introduced E without the consent of the respective Yang di-Pertua Negeri, it contravened art. 161E(2)(b).

[20] The same conclusion can be reached by looking into the historical background to the Federal Constitution. The starting F point is the report of the Inter-Government Committee, 1962 (IGC) and the Malaysia Agreement dated 8 July 1963. The former document contains the terms and conditions in which Sabah and Sarawak agreed to form Malaysia and this is reflected in art. VIII of the Malaysia Agreement which states as follows:

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> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other actions as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B, the Report of the Inter-Governmental Committee signed on H 27th February 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.

[21] In so far as this case is concerned, the relevant section is para. 26(15) of Chapter 3 of IGC which states as follows:

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The Federal Constitution should contain provision enabling Judicial Commissioners to be appointed in the Borneo States on the lines of the existing s. 10(i)(b) of the Sarawak, North Borneo and Brunei (Courts) Order in Council subject to the following two modifications:

(a) there should be two methods for the appointment of Judicial Commissioners:

(i) by the Yang di-Pertua Agong on the advice of the Chief Justice of Malaysia; and

(ii) by the Head of State of North Borneo or Sarawak on the advice of the Chief Justice of the High Court; and

(b) Judicial Commissioners should be appointed only from among persons qualified under Section 4(1) of the Advocates Ordinances of North Borneo and Sarawak to practice as advocates before the High Court.

[22] This recommendation was entrenched in the repealed art. 122A(3) and (4) of the Federal Constitution. Hence it can be said that the 1994 Amendments had contravened the IGC report which for all intent and purpose set out the rights of Sabah and Sarawak in the formation of Malaysia. These rights are protected rights and its protection lies in the consent of the respective States through the consent of the Yang di-Pertua Negeri. Thus it can be inferred that the repealed art. 122A(3) and (4) of the Federal Constitution (which is para. 26(15) of Chapter 3 of IGC) can only be repealed with the consent of the Yang di-Pertua Negeri of Sabah and Sarawak. The sanctity of the IGC report and the Malaysia Agreement has been upheld by two decisions of the Apex Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 and *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii* [2009] 4 CLJ 449. In *Sugumar*'s case, one of the issues for consideration by the Federal Court was whether the amendment to s. 65(1)(c) of the Immigration Act contravened the agreement Relating to Malaysia 1963 and IGC report 1962 and Mohd Dzaiddin FCJ held:

We are of the view that the spirit and intention of the Agreement Relating to Malaysia 1963 and the Report of the Inter-Governmental Committee had not been contravened

[23] In *Datuk Haji Mohammad Tufail Mahmud*'s case, a five member bench of the Federal Court through the Chief Justice of Malaysia remarked as follows:

> [14] Safeguards and assurances provided to Sarawak (in this case, lawyers) were critical and pivotal to secure the participation of Sarawak in the formation of Malaysia.
>
> [15] The Cobbold Commission was created to ascertain the views of the people of the Borneo States. The report showed that the people had fears of substitution of one colonization with another; fear of being taken over by the then Federation of Malaya; fears of the submersion of the individualities of North Borneo and Sarawak within the then Federation of Malaya.
>
> [16] The Cobbold Commission unanimously agreed that the formation of the Federation of Malaysia is in the best interest of North Borneo and Sarawak.
>
> [17] These fears were ultimately addressed by the formation of the Inter-Governmental Committee (IGC) on which the British, Malaya (now properly known as Semenanjung Malaysia), North Borneo and Sarawak Governments were represented. Its task was to work out the future constitutional arrangements, including safeguards for the special interests of North Borneo and Sarawak relying on the Cobbold Commission Report. The relevant paragraphs being paras. 3, 6 and 76 of the IGC report 1962.
>
> [18] Following the IGC Report, the Malaysia Agreement was concluded between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore and signed on 9 July 1963. By the Malaysia Agreement, Malaysia came into being on 16 September 1963.
>
> [19] Article VIII of the Malaysia Agreement provides that the 3 Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as maybe required to implement the assurances, undertakings and recommendations contained in, *inter alia*, Annexes A and B to the IGC Report, in so far as they are not implemented by express provision of the Constitution of Malaysia.

[20] It was submitted that the right to practice law, can be seen in one of the safeguards contained in Annexure A to the Inter-Governmental Commission report. Para 4 of Annexure A is about Civil and Criminal Law and procedure and the administration of Justice. Paragraph 4(d) ("the 4(d) Safeguard"), which is the relevant part, reads as follows:

> 4(d): Persons entitled to practise before such Courts; Restrictions on the lines of the existing Borneo legislation should be continued, so that practice at the local Bar would, subject to certain exceptions provided for in that legislation, be restricted to resident advocates, until otherwise agreed by the Borneo State Legislatures.

[21] By the 4(d) Safeguard, it was agreed that after formation of Malaysia, the exclusive rights of the Sarawak Bar to practise in respect of all Sarawak matter (ie, all matters in or arising in Sarawak) as stated in s. 8 of Advocates Ordinance before Malaysia day would continue.

[22] Even before the formation of Malaysia, the Sarawak Bar, under the Advocates Ordinance of Sarawak, had the exclusive right to:

i. practice in Sarawak;

ii. appear and plead in the Supreme Court; and

iii. appear and plead in all subordinate Courts in Sarawak

[23] It must be noted that without such recommendations in the IGC, Cobbold Commission and the Malaysia Agreement, there may not be a Malaysia. These recommendations were not intended to and did not take away any of the Sarawak Bar's exclusive right. In fact, the rights were entrenched as a safeguard and were further extended so as to cover the right of audience before the new Federal Court.

[24] From these pronouncements, it is clear that the Apex Court in Malaysia has treated the Malaysia Agreement and the recommendations of the IGC report as a binding agreement which should not be contravened without the consent of the two States.

[25] It is not insignificant that the counsel for the defendant had informed the court that the consent of the Yang di-Pertua Negeri of Sabah and Sarawak was obtained pursuant to art. 161E(2)(b) of the Federal Constitution when amendment was made to art. 121(1) of the Federal Constitution in 1988.

[26] Accordingly it is my view that the 1994 Amendment is invalid and therefore is null and void in so far as it concerns the removal of the power to appoint judicial commissioners by the respective Yang di-Pertua Negeri of Sabah and Sarawak.

Issue 4 – Whether The Enactment Of The Judicial Appointments Commission Act 2009 (Act 695) Which Came Into Force On 2 February 2009 Is Unconstitutional, Null And Void On The Grounds That:

(a) it departs from the constitutional procedure and mode of appointment of judicial commissioners and judges set out in arts. 122AB and 122B of the Federal Constitution and in effect it would be the substitute for the present consultative process between the Prime Minister and the individual judges under the said Articles;

(b) it is in effect an amendment of arts. 122AB and 122B of the Federal Constitution and enacted in contravention of art. 159(3) of the Federal Constitution;

(c) there was no concurrences of the Yang di-Pertua Negara of each of the States of Sabah and Sarawak pursuant to art. 161E(2)(b) of the Federal Constitution; and

(d) Section 37 of Act 695 was enacted in contravention of arts. 44 of the Federal Constitution.

[27] The Judicial Appointment Commission Act 2009 (JAC Act) came into force on 2nd February 2009. Through the JAC Act 2009, a Judicial Appointments Commission (JAC) was established mainly to make recommendation to the Prime Minister on the candidates to be appointed as judicial commissioners or judges or on the promotion of sitting judges to the higher courts. The relevant provisions for the purpose of this suit are as set out below. Section 5 of the JAC Act 2009 provides:

Constitution of the Commission

(1) The Commission shall consist of the following members:

(a) the Chief Justice of the Federal Court who shall be the Chairman;

(b) the President of the Court of Appeal;

(c) the Chief Judge of the High Court in Malaya;

(d) the Chief Judge of the High Court in Sabah and Sarawak;

(e) a Federal Court judge to be appointed by the Prime Minister; and

(f) four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.

(2) The appointment of members of the Commission and the duration of the appointment shall be published in the Gazette.

[28] Section 21 of the JAC Act 2009 provides:

Functions and powers of the Commission

(1) The functions of the Commission are:

(a) to select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration;

(b) to receive applications from qualified persons for the selection of judges of the superior court;

(c) to formulate and implement mechanisms for the selection and appointment of judges of the superior court;

(d) to review and recommend programmes to the Prime Minister to improve the administration of justice;

(e) to make other recommendations about the judiciary; and

(f) to do such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions under this Act.

(2) The Commission shall have all such other powers as may be necessary for, or in connection with, or reasonably incidental to, the performance of its functions under this Act.

[29] Section 22 of the JAC Act 2009 provides:

Selection process

(1) On receiving a request, the Commission must notify the members of the Commission and prepare for a selection meeting.

(2) In a selection meeting, the Commission shall apply the selection process as prescribed by regulations made under this Act and:

(a) select not less than three persons for each vacancy in the High Court; or

(b) select not less than two persons for each vacancy where the vacancy is for judges of the superior courts other than the High Court.

[30] Section 23 of the JAC Act 2009 provides:

Selection criteria

(1) A candidate is qualified for selection if he fulfills the requirement under Article 123 of the Federal Constitution.

(2) The Commission in selecting candidates shall take into account amongst others, the following criteria:

(a) integrity, competency and experience;

(b) objective, impartial, fair and good moral character;

(c) decisiveness, ability to make timely judgments and good legal writing skills;

(d) industriousness and ability to manage cases well; and physical and mental health.

(3) A person who is a serving judge or judicial commissioner must not be appointed if he has three or more pending judgments or unwritten grounds of judgments that are overdue by sixty days or more from the date they are deemed to be due.

(4) The Commission in selecting candidates must also take into account the need to encourage diversity in the range of legal expertise and knowledge in the judiciary.

[31] Section 26 of the JAC Act 2009 provides:

Report on recommendation

(1) After making its selection, the Commission shall submit to the Prime Minister a report which shall:

(a) state who has been selected by the Commission to be recommended for the appointment to the office concerned;

(b) state the reasons for such selection; and

(c) contain any other information the Commission deems necessary to bring to the knowledge of the Prime Minister.

(2) After submitting the report, the Commission shall provide any further information as may be required by the Prime Minister.

[32] Section 27 of the JAC Act 2009 provides:

The Prime Minister may, after receiving the report under section 26, request for two or more names to be selected and recommended for his consideration with respect to any vacancy to the office of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya, the Chief Judge of the High Court in Sabah and Sarawak, judges of the Federal Court and the Court of Appeal, and the Commission shall, as soon as may be practicable, comply with the request in accordance with the selection process as prescribed in the regulations made under this Act.

[33] Section 28 of the JAC Act 2009 provides:

Where the Prime Minister has accepted any of the persons recommended by the Commission, he may proceed to tender his advice in accordance with Article 122B of the Federal Constitution.

[34] Section 37 of the JAC Act 2009 provides:

37. Prevention of difficulties or anomalies.

(1) The Prime Minister may, whenever it appears to him necessary or expedient to do so, whether for the purpose of removing difficulties or preventing anomalies in consequence of the enactment of this Act, by order published in the Gazette make such modifications to any provisions of this Act as he thinks fit.

(2) The Prime Minister shall not exercise the powers conferred by this section after the expiration of two years from the date of coming into operation of this Act.

(3) In this section, "modifications" includes amendments, additions, deletions, substitutions, adaptations, variations, alteration and non-application of any provisions of this Act.

[35] The plaintiff's submission is this. The JAC Act had in fact amended the manner in which judges are appointed to the courts in Malaysia as provided by art. 122AB and 122B of the Federal Constitution which dictates that the Prime Minister 'shall consult' the Chief Justice, President of Court of Appeal, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak (relevant judges) before advice is given to the Rulers for appointment of judges to the High Court, Court of Appeal and Federal Court. Counsel for the plaintiff further submits that since the JAC Act did not have the consent of the respective Yang di-Pertua Negeri of Sabah and Sarawak, it contravenes art. 161E of the Federal Constitution. On those grounds, the JAC Act is unconstitutional and hence null and void.

[36] For the defendant, its submission in the words of counsel is this:

6.2. This selection process takes place before the appointment process set out in Articles 122AB and 122B of the Federal Constitution. That being the case, Act 695 has no impact on the appointment of Judges and JCs and is therefore not inconsistent with the said Articles in the Federal Constitution.

6.3. By the same token, the procedure laid down in Act 695 does not tantamount to a constitutional amendment. By no stretch of imagination can a process which is not even prescribed in the Constitution be construed as a constitutional amendment.

[37] For convenience I set out art. 122AB and 122B:

122AB. Appointment of judicial commissioner.

(1) For the despatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period

or such purpose as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed; and anything done by him when acting in accordance with his appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

(2) The provisions of Clauses (2) and (5) of Article 124 shall apply to a judicial commissioner as they apply to a judge of a High Court.

122B. Appointment of judges of Federal Court, Court of Appeal and of High Courts.

(1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122c) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

(2) Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice of the Federal Court, the Prime Minister shall consult the Chief Justice.

(3) Before tendering his advice as to the appointment under Clause (1) of the Chief Judge of a High Court, the Prime Minister shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak.

(4) Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice, President or a Chief Judge, the Prime Minister shall consult, if the appointment is to the Federal Court, the Chief Justice of the Federal Court, if the appointment is to the Court of Appeal, the President of the Court of Appeal and, if the appointment is to one of the High Courts, the Chief Judge of that Court.

A

(5) This Article shall apply to the designation of a person to sit as judge of a High Court under Clause (2) of Article 122AA as it applies to the appointment of a judge of that court other than the Chief Judge.

B

(6) Notwithstanding the dates of their respective appointments as judges of the Federal Court, of the Court of Appeal or of the High Courts, the Yang di-Pertuan Agong, acting on the advice of the Prime Minister given after consulting the Chief Justice, may determine the order of precedence of the judges among themselves.

C

[38] The JAC Act, I agree with counsel for the defendant, merely provides a process in which candidates for judgeship are vetted by the JAC. As stated in the explanatory statement to the JAC Bill 2008, it seeks:

D

> ... to improve the process of appointment of judges under the Federal Constitution. This Bill will complement the existing provisions of the Federal Constitution, making the process more collective and transparent whilst preserving the Prime Minister's prerogative in judicial appointments.

E

[39] It is patently clear that the Federal Constitution does not provide any process in which the credentials of the candidates for judgeship are discussed before their names are presented to the Prime Minister for consideration. Neither is there any guideline provided for in the Federal Constitution to determine which

F

candidates for judgeship are qualified to be appointed. The JAC Act attempts to rectify those shortfalls and it can be said that the JAC Act is a welcome piece of legislation. Be that as it may, it must not be a 'backdoor' legislation to circumvent the Federal Constitution as that would be unconstitutional.

G

[40] Having read the relevant provisions set out above, one thing is clear and that is all JAC do in their function is to recommend to the Prime Minister qualified candidates for judgeship and such recommendations remain as 'recommendations' only in that the

H

Prime Minister's discretion is completely untouched which is as provided in art. 122AB and 122B of the Federal Constitution. However, there is no provision in the JAC Act as to when this process of selecting suitable candidates is to occur. Is it before or after the consultation with the relevant judges? Article 122AB and

I

122B of the Federal Constitution provides that 'the Prime Minister

shall consult' the relevant judges before he advises the Yang di Pertua Agong for any appointment of judges. This duty to consult is a constitutional duty and it can only be taken away by an express amendment to the Federal Constitution ie, by votes of two third of members of Parliament. Of course there was no such constitutional amendment and hence the JAC Act must be read subject to that constitutional duty to consult. What this means is set out in *B Surinder Singh Kanda v. The Government of the Federation Malaya* [1962] 1 LNS 14, where Lord Denning when delivering the advice of the board said:

> In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

[41] A similar approach can be seen in *State of Bihar and Others v. Bihar Distillery Ltd* AIR [1997] SC 1511 where Jeevan Reddy J said:

> The approach of the Court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should to try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

[42] In *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, the court was faced with a piece of State legislation which gave the State Government a discretion whether or not to pay compensation for acquisition of landed property which is inconsistent with art. 13 of the Federal Constitution. This is how Gopal Sri Ram JCA (as he then was) resolved the inconsistency:

> The way in which s. 12 is to be brought into conformity with the Constitution is to make it yield to art. 13(2) which reads:
>
> 13(2) No law shall provide for compulsory acquisition or use of property without adequate compensation,
>
> That is achieved by not reading the words "the State Authority may grant compensation therefor" as conferring a discretion on the State Authority whether to grant compensation or not. For otherwise it would render s. 12 of the 1954 Act violative of art. 13(2) and void because it will be a law that provides for the

A compulsory acquisition of property without adequate compensation. A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s. 12 will be unconstitutional.

B

[43] Reverting back to the case at hand and applying the approach set out above, the JAC Act must be read subject to the constitutional duty to consult. In another word, the recommendations of the judicial commission are subjected to the C Prime Minister's duty to consult the relevant judges.

[44] Accordingly s. 28 of the JAC Act 2009 should not be read as if there is no requirement for the Prime Minister of the day to consult the relevant judges before he tenders his advice in D accordance with art. 122AB and 122B of the Federal Constitution and to read otherwise would make s. 28 *ultra vires* the Federal Constitution.

[45] Lastly as for s. 37 of the JAC Act, whichever way one reads E it; it gives the power of the Prime Minister to amend any provisions of the JAC Act by way of a gazette. Any amendment to the JAC Act or for that matter any legislation is an exercise of legislative power. The doctrine of separation of powers embodied in the Federal Constitution dictates that only the Parliament can F make or amend laws. Accordingly I am left with no option but to hold that s. 37 of the JAC Act null and void as it contravenes the Federal Constitution. This finding is now of course academic as this provision has a sunset clause of two years and the sun has since set on 9 February 2011.

G **Orders Of The Court**

[46] For all the reasons stated above, I make the following declarations:

H 1. Article 122AB of the Federal Constitution is null and void in so far as the appointment of judicial commissioners by the respective Yang Dipertua Negeri of Sabah and Sarawak is concerned.

2. Section 37 of the Judicial Appointments Commission Act is null I and void.

and order that:

1. The plaintiffs claim that the Judicial Appointments Commission Act (except for s. 37) is unconstitutional be dismissed.

[47] As for costs, I make no order as this case is a public interest litigation. Order accordingly.

Supplementary Judgment

[48] This judgment is supplemental to the grounds I gave on 14 March 2011. The remaining issue for determination is issue 2 which is this:

> Whether the concurrence of the Yang di-Pertua Negeri of each of the States of Sabah and Sarawak is required pursuant to Article 161E(2)(b) of the Federal Constitution when Article 121(1) of the Federal Constitution was amended with effect from 10.6.1988?

[49] During submissions, counsel for the plaintiff agreed that if proof of the consent of the respective Yang di-Pertua Negeri of Sabah and Sarawak are shown to the court, he will not pursue this issue. The defendant did show such proofs yesterday and they are these:

> Consent Of Sabah Yang Dipertua Negeri
>
> Cmds 806/7/(7/88)
> From: Chiefmin Kota Kinabalu
> To: YB Ketua Setiausaha Negara 5 April 1988
> Jabatan Perdana Menteri
> Jalan Dato Onn
> Kuala Lumpur
>
> Dengan Hormatnya Dimaklumkan Bahawa TYT Yang Di-pertua Negeri Telah Memberi Persetujuan (Concurrence) Di Bawah Perkara 161E(2)(B) Perlembagaan Persekutuan Untuk Meminda Perkara 121 Perlembagaan Persekutuan Seperti Berikut:
>
> (A) Dengan Menggantikan Perkataan-perkataan "Tertakluk Kepada Fasal (2) Kuasa Kehakiman Bagipersekutuan Ada-lah Terletak Pada" Di Permulaan Fasal (1) Dengan Perkataan-Perkataan "Maka Hendaklah Ada",
>
> (B) Dengan Menggantikan Perkataan-perkataan "Dan Juga Pada Mana2 Mahkamah Bawahan Sa-bagaimana Yang Diperuntokkan Oleh Undang2 Persekutuan" Di Hujung Fasal

(1) Dengan Perkataan-perkataan "Dan Mana-mana Mahkamah Bawahan Sebagaimana Yang Diperuntukkan Oleh Undang-undang Persekutuan, Dan Mahkamah-mahkamah Tinggi Dan Mahkamah-Mahkamah Bawahan Hendaklah Mempunyai Apa-apa Bidang Kuasa Dan Kuasa Sebagaimana Yang Diberikan Oleh Atau Di Bawah Undang-undang,

(C) Dengan Memasukkan, Selepas Sahaja Fasal (1), Fasal Baru (1A) Yang Berikut:

(1A) Mahkamah-mahkamah Yang Disebutkan Dalam Fasal (1) Tidaklah Boleh Mempunyai Bidang Kuasa Berkenaan Dengan Apa-apa Perkara Dalam Bidang Kuasa Mahkamah Syariah.

Sekian, Daripada Setiausaha Kerajaan Negeri, Sabah.

S.k. YB Peguam Negara
Jabatan Peguam Negara
Bangunan Bank Rakyat
Kuala Lumpur

Signature:
Date:

(Ngui Thien Soong)
Bahagian Kabinet Dan Perlembagaan
b.p Setiausaha Kerajaan Negeri

4/4/1988

Consent Of The Sarawak Yang Di Pertua Negeri

Hakim MA33548
Kepada YAA Tan Sri Abu Talib Osman
Jabatan Peguam Negara
Kuala Lumpur

Saya Merujuk Kepada Percakapan Di Antara Tan Sri Abu Talib Osman/Datuk Amar Haji Bujang Mohd Nor Pada 5 April 1988 Dan Dengan Sukacita Menyampaikan Di Sini Persetujuan Daripada TYT Yang Dipertua Negeri Sarawak Mengikut Kehendak Artikel 161E(2) Ke Atas Pindaan Kepada Artikel 121 Sebagaimana Yang Terdapat Dalam Klausul 8 Dan Perkara 24 Senarai Persekutuan (Senarai 1), Jadual Ke-9 Perlembagaan Persekutuan Sebagaimana Yang Terdapat Dalam Klausul 12 Akta Perlembagaan (Pindaan), 1988. Telex Ini Ialah Susulan Kepada Surat Saya Kepada Ketua

Setiausaha Negara Bilangan 43/PKM/SUK/SUL/258/1 Bertarikh 30 Mac 1988 Mengenai Pindaan Kepada Perlembagaan Persekutuan.

Datuk Amar Haji Bujang Mohd Nor
Setiausaha Kerajaan Negeri
Sarawak
6.4.1988
Hidmat MA700910
Hakim MA33438

[50] Accordingly the plaintiff's claim that art. 121(1) of the Federal Constitution is unconstitutional is dismissed with no order as to costs.